Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1392

STATE OF WASHINGTON,
Petitioner,

vs.

CHARLES EDWARD LESNICK,
Respondent.

On Certiorari from the Supreme Court of the State of Washington

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

Opinions Below

The opinions of the Supreme Court of the State of Washington are reported at 84 Wn.2d 940, 530 P.2d 243 (1975), and are set forth in Appendix A, infra, at pages ..... The opinions of the Court of Appeals are reported at 10 Wash. App. 281, 518 P.2d 199 (1973), and are set forth in Appendix B,infra, at pages .....

Jurisdiction

The decision and judgment of the Supreme Court of the State of Washington was filed on January 7,

1975. An order denying the petition for rehearing was filed February 20, 1975. The jurisdiction of this court to review the decision of the Washington Supreme Court is conferred by 28 U.S.C. §1257(3).

Questions Presented

The question presented for review here concerns the scope and appropriateness of a police investigation in response to an anonymous tip involving criminal activity.

On October 23, 1970, the Kelso Police Department received an anonymous phone tip that there was at that time in the City of Kelso a white Ford van pulling a U-Haul trailer, and that the driver of the vehicle was attempting to sell punchboards in the city. The anonymous tip also provided the license plate number of the vehicle. At the time of receiving this tip, punchboards were contraband in the State of Washington.

Upon receipt of this information, members of the Kelso Police Department located the vehicle in a parking lot at a local private club. Shortly thereafter, a man approached the van and began driving the van onto the street. The officers followed the vehicle for a block and a half and then pulled it over, using their emergency equipment. The officers approached the car and asked the driver for identification. As one of the officers walked to the front of the van to check the license plate number, he observed gambling paraphernalia through the window of the van. The defendant was placed under arrest for possession of gambling devices. The question involved herein is: To what extent may law enforcement officials operating upon an anonymous tip

seek out criminal activity? In other words, may police officers acting upon anonymous tips not amounting to probable cause make contacts with private citizens which require a minimal investigatory detention, but which involve no arrest or intrusion onto the person of the subject detained?

Constitutional Provisions Involved

The case here involved the application of the Fourth Amendment to the United States Constitution. The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of the Case

The Kelso Police Department received a telephone call advising that there was in that city a described van pulling a trailer, the driver of which was attempting to sell punchboards in the city. The caller also supplied a license plate number. The caller remained completely anonymous, refusing to identify himself and not providing any information as to the source of his knowledge. The police chief and a sergeant participated in a search and soon located the described van and trailer in a private club parking lot. They drove to within a short distance of the subject vehicle, and observed that its license number was similar to that given by the informer, though some numerals were transposed. The officers parked their car on an adjacent city street and re-

mained to observe the vehicle. Shortly thereafter the van was driven from the parking lot onto the street. The officers followed the vehicle for a block and a half, then pulled it over with siren and lights. Up to that time, they observed neither traffic violation nor any other indications of criminal activity on the part of the driver. The driver produced his driver's license and the chief then walked to the front of the van to check the license plate, and observed gambling paraphernalia through the driver's window. Defendant was then placed under arrest for possession of gambling devices pursuant to RCW 9.47.030, Repealed Laws of 1971, First Extraordinary Session, Chapter 287, §23. Defendant's vehicle was towed to the police station and searched pursuant to a warrant. A large number of gambling devices, plus certain merchandise, were seized. [Appendix infra .....]

History of Proceedings

The defendant was charged by complaint on October 26, 1970, in Cowlitz County District Court, not a court of record. The defendant made a motion to suppress the evidence in this case in the District Court on November 9, 1970. The basis for suppression was that the evidence was gained in violation of the Fourth Amendment of the United States Constitution. The motion was denied, the defendant was convicted on that date. Thereafter the defendant appealed to the Superior Court of the State of Washington for Cowlitz County, and a trial de novo was held. At that trial defendant moved to suppress the evidence again based upon a violation of the Fourth Amendment of the United States Constitution. The motion for suppression was denied on December 17, 1970, by the Honorable John N. Skimas, Judge, and the defendant was tried on April 26, 1971 [Appendix C]. He was convicted on April 26, 1971, and filed a notice of appeal on April 27, 1971.

In his appeal the defendant alleged that his constitutional rights under the Fourth Amendment had been violated and an opinion entered on December 28, 1973, by the Washington State Court of Appeals affirmed defendant's contention and reversed the conviction based upon a violation of the Fourth Amendment. Thereafter the State of Washington petitioned for rehearing or modification and that order was denied on January 31, 1974.

Thereafter the State of Washington petitioned the Supreme Court of the State of Washington for review of the decision of the Court of Appeals. An order granting the petition for review was entered by the Supreme Court of the State of Washington on March 18, 1974, and the case was argued to the Washington State Supreme Court. Again the sole issue of that appeal involved the application of the Fourth Amendment of the United States Constitution. On January 7, 1975, the Washington State Supreme Court affirmed the decision of the Court of Appeals. A petition for rehearing of the decision of the Washington State Supreme Court was filed by the State of Washington and denied on February 20, 1975. This petition followed.

Argument

This case presents a question not previously decided by this court, a question of great public concern. That question is: To what extent may law enforcement officials respond to an anonymous tip in investigating criminal activity?

Ours is a tension-filled and hurried society. Crime is a serious and imminent problem, and law enforcement agencies are often forced to react to emergent situations without the benefit of complete investigation. Many of the situations which law enforcement agencies are required to respond to are not capable of being fully investigated before the police are required to act. Many of these emergencies are initiated by anonymous tips to police or others.

Bomb threats, whether real or hoax, require immediate responses. No police agency would refuse to take action upon a bomb threat simply because the information or threat was supplied by an anonymous phone call. Many people, witnesses to crimes or with knowledge of crimes about to be committed, and yet fearing publicity, retaliation, or personal involvement, seek to aid law enforcement and yet remain anonymous. The anonymous tip by phone is a response to the problem of becoming involved while still assisting in the enforcement of laws and the protection of society.

And yet the Supreme Court of the State of Washington has, by its opinion in this case, indicated that the Fourth Amendment to the United States Constitution prohibits law enforcement agencies from making even an *investigation* of suspected criminal activity if that investigation involves even a minor and temporary infringement of personal liberties, where that investigation is initiated by an anonymous tip.

The Washington court has failed to heed the observation of Justice Burton concurring in *Brinegar v. United States,* 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949), wherein Justice Burton stated:

> "It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible. Government agents are commissioned to represent the interest of the law, and this requires affirmative action not only when there is reasonable grounds for arrest or probable cause for a search, but when there is reasonable grounds for an investigation." 338 U.S. 179.

This court in *Terry v. Ohio,* 329 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and *Adams v. Williams,* 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), recognized the problem presented by this case. In *Terry,* supra, the court noted:

> "On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets, the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For this purpose it is urged that distinction should be made between a 'stop' and an 'arrest' (or a 'seizure' of a person), and between a 'frisk' and a 'search'. Thus, it is argued, the police should be allowed to 'stop' a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity." 329 U.S. 10.

In *Adams,* supra, the court noted:

> "In *Terry* this court recognized 'that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.' ID(d)., at 22, 88 S.Ct., at 1880.
>
> "The Fourth Amendment does not require a policeman who lacks the precise level of infor-

> mation necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an immediate response." 407 U.S. 145.

In response to this problem this court has suggested a dual inquiry in determining whether or not the police conduct involved in a given situation violated the Fourth Amendment. First, was the initial response justified by the information available to the police at the time the investigation was initiated? Second, was the scope of the police conduct warranted by the information available?

It is the position of the petitioner that the Washington State Supreme Court failed to apply this dual inquiry test.

In *Terry,* supra, the question presented concerned a stop-and-frisk procedure. There the court was asked to accept a practice where a police officer placed an individual in a spread position on a public street and then patted down the suspect. The Court, in sanctioning the conduct, inquired into the information available to the police officer prior to the confrontation. The Court ruled that the police response must be appropriate to the information justifying the initial investigation. The Court found that the information which the police officer had prior to the confrontation did justify the intrusion in that case.

In *Adams,* supra, a police officer approached a suspect in a parked car and asked him to roll down his window. When the window was rolled down, the officer reached into the clothing of the suspect and

withdrew a pistol from his clothes. Again the Court inquired into the source and nature of the officer's knowledge prior to initiating the contact, in determining whether or not the scope of the particular intrusion by the police officer was justified.

The petitioner here seeks to have this Court consider whether or not a police investigation which involves only a stop and inquiry, without any intrusion into the clothing of the suspect or any touching of any kind, is warranted by a police officer investigating an anonymous phone tip of criminal activity in progress. As pointed out above, this Court in both *Terry,* supra, and *Adams,* supra, has recognized, without deciding, the problem presented by this petition.

But the Washington court has held that a police investigation which involves only the most minor inconveniences and which involves absolutely no intrusion onto the person of the suspect, will not be justified unless there exists the same indicia of reliability which this court found to be necessary to sustain a police officer in making a physical intrusion into the clothing of a suspect. The Washington court has misread *Adams* to require the same indicia of reliability for *investigation* as is necessary to sustain a physical intrusion. The court in effect has said that no alternatives exist between no police investigation and a police search based upon strong evidence.

Under the opinion of the Washington court, the following conduct would be considered unlawful: Police receive an anonymous tip that a citizen has just been seen loading a body into an automobile. The automobile is described by the anonymous in-

formant. Police officers then observe the automobile driving out of town. Under the Washington court's ruling, police could not even stop the vehicle and request identfication from the driver. If the police did stop the vehicle to request identification from the driver and in the process observed a body lodged in the back of the car, the evidence would be suppressed as having been gained by an unreasonable search and seizure.

Again, police receive an anonymous tip that a person driving a described automobile has placed a bomb at a school. Police officers observe the car described in the area of the school. Under the court's opinion, it would be unlawful for the police to stop the car and make inquiries of the driver. If, after stopping the car, police observe explosives in the car, this potential evidence would be suppressed as seized through an unlawful search and seizure.

These examples point out the absurdity of the opinion of the Washington court herein. It is respectfully suggested that the Fourth Amendment does not require police to simply shrug their shoulders at the suggestion of criminal activity.

Finally, the Washington court justified its decision upon the grounds that the offense involved here was only a gross misdemeanor and indicated that the results might be different if a felony were involved. This, of course, ignores two fundamental principles.

First, the Fourth Amendment mandates the same type of police conduct for police officers regardless of the nature of the offense. The Fourth Amendment protects citizens suspected of felonies as well

as those suspected of misdemeanors. If the police conduct herein was justified under the Fourth Amendment, it should not make any difference whether the crime involved was a felony or a misdemeanor.

Second, police officers cannot be expected to always know whether they are investigating a felony or a misdemeanor. Many individual fact patterns do not lend themselves to the instant analysis that the Washington court seems to suggest may be the determining factor in warranting a further police investigation. An anonymous tip of criminal drug activity may involve either felonious or misdemeanant activity. A tip involving criminal activity in explosives might be either a misdemeanor or a felony depending upon the results of the investigation. An anonymous tip about an assault may easily involve either a felony or a misdemeanor.

The interpretation suggested by the Washington court would limit police investigations unless they satisfied a standard which the Washington court has declined to define. This, of course, imposes an unworkable burden upon police agencies and suggests that the results of the investigation, i.e., whether a felony or a misdemeanor is proven, somehow will determine the propriety of the initial investigation.

It is axiomatic that the results of the police investigation will not have a bearing upon the reasonableness of the police in beginning the investigation. The Fourth Amendment operates upon the basis of the reasonableness of police conduct in view of the information available to the police at the time of the investigation. Bootstrapping, as suggested by the

Washington court, simply will not reconcile itself with the Fourth Amendment.

Therefore, petitioner respectfully requests that this Court review the decision of the Washington State Supreme Court herein and decide the issues presented by this case.

Respectfully submitted,

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APPENDIX A

[No. 43141. En Banc. Jan. 7, 1975

THE STATE OF WASHINGTON, *Petitioner*,

v.

CHARLES EDWARD LESNICK, *Respondent*.

[1] Searches and Seizures—Objects in Plain View—Right To Make Observation—Necessity. The plain view doctrine only applies to objects observable by an officer who has a right to be in a position to so observe.

[2] Searches and Seizures—Detention for Questioning—In General. A police officer may detain a person for questioning or investigation without having probable cause for arrest when his actions are reasonable in the light of the particular circumstances. Determining reasonableness in such a situation requires a balancing of the interests of society and of the individual.

[3] Searches and Seizures—Detention for Questioning—Informant's Tip. A detention for investigation not amounting to an arrest may be made on the basis of information supplied by an informant only if the information demonstrates some indicia of responsibility providing an objective measure of reasonableness. Reasonableness must be determined on the basis of circumstances existing prior to the detention, such as the seriousness of the suspected crime and the presence or absence of a threat of violence as well as factors relating to reliability of the tip.

[4] Gaming—Confiscation of Gambling Devices—

Statutory Provisions. A strict construction of RCW 9.47.110, which provides for destruction of gambling devices, requires that only gambling devices "per se" should be subject to the statute, and not merchandise which merely could be used for prizes.

Hamilton, J., dissents; Hale, C. J., and Hunter and Wright, JJ., dissent by separate opinion.

Review of a decision of the Court of Appeals, December 28, 1973, 10 Wn. App. 281. *Affirmed.*

The Court of Appeals affirmed in part and reversed in part a judgment of the Superior Court for Cowlitz County, No. 4312, John N. Skimas, J., entered March 10, 1972. The respondent (State) petitioned the Supreme Court for review.

Prosecution for possession of gambling devices. The defendant appealed to the Court of Appeals from a conviction and sentence.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Petitioner*, v. CHARLES EDWARD LESNICK, *Respondent*.	No. 43141 EN BANC
	FILED Jan. 7, 1975

BRACHTENBACH, J.—The defendant appeals from his conviction of the crime of possession of gambling devices. Defendant sought suppression of certain punchboards and other gambling paraphernalia as being the product of an unlawful search of his vehicle. The Court of Appeals reversed the trial court's admission of those items into evidence but affirmed the trial court's order of destruction of the gambling devices, as will be more fully explored later. *State v. Lesnick,* 10 Wn. App. 281, 518 P.2d 199 (1973). We affirm the Court of Appeals, but do so with one major additional point of emphasis in order to meet contentions which the state presented in its petition for review.

The following facts are essentially adopted from the opinion of the Court of Appeals. The Kelso police department received a telephone call advising that there was in the city a described van pulling a trailer, the driver of which was attempting to sell "punchboards" in the city. The caller also supplied a license plate number. The caller remained completely anonymous, refusing to identify himself and not providing any information as to the source of his knowledge.

The police chief and a sergeant participated in a search and soon located the described van and trailer in a private club parking lot. They drove to within a short distance of the subject vehicle, and observed that its license number was similar to that given by the informer, though some numerals were transposed. The officers parked their car on an adjacent city street and remained to observe the vehicle. Shortly thereafter, the van was driven from the parking lot onto the street. The officers followed the vehicle for a block and a half, then pulled it over with siren and lights. Up to that time, they observed neither traffic violations nor any other indications of criminal activity on the part of the driver.

The driver produced his driver's license and the chief then walked to the front of the van to check the license plate, and observed gambling paraphernalia through the driver's window. Defendant was then placed under arrest for possession of gambling devices pursuant to RCW 9.47.030, repealed Laws of 1971, 1st Ex. Sess., ch 280 § 23. Defendant's vehicle was towed to the police station and searched pursuant to a warrant. A large number of gambling devices, plus certain merchandise, were seized.

The state makes two main contentions: (1) that discovery of the contraband gambling paraphernalia falls within the "plain view" doctrine and (2) that the initial stop of defendant's automobile was a permissible "investigative detention" within the doctrine of *Terry v. Ohio,* 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

The plain view doctrine comes into play only when the officer "has a right to be in a position to have that view." *State v. Cagle,* 5 Wn. App. 644, 490 P.2d

123 (1971). Hence the determinative issue is whether the police had a right to stop defendant's automobile and, thereby, put themselves in a position to view the contraband.

The United States Supreme Court, and this Court, have acknowledged that it is necessary to make a delicate balancing of the interest of society in the enforcement of its laws against the individual's right to protection against unreasonable searches and seizures under the Fourth Amendment. *Terry v. Ohio, supra; Adams v. Williams,* 407 U.S. 143, 32 L. Ed. 2d 612, 92 S. Ct. 1921 (1972); *State v. Gluck,* 83 Wn.2d 424, 518 P.2d 703 (1974).

As a threshold premise, *Terry* confirms that something short of placing a person under arrest may constitute a seizure within the meaning of the Fourth Amendment. "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio, supra* at 16. Indeed, the chief of police here admitted that after defendant was not free to leave until the officers' investigation and interrogation were completed.

The second step in our reasoning is the holding of *Terry* that any intrusion upon this constitutionally protected interest must be evaluated as to the reaonableness of the particular seizure in light of the particular circumstances. The "stop and frisk" in *Terry* was based on the police officers' personal observations of suspicious activities which suggested possible criminal activity and justified further investigation.

Terry standing alone would not justify the investigative stop in this case since here the police made

no personal observations of any activity of the defendant justifying the stop. However, as pointed out in the Court of Appeals opinion, the United States Supreme Court has gone a step further and authorized an investigative stop on information supplied by another person. This is the holding of *Adams v. Williams, supra*. But *Adams* is very explicit in requiring that the informer's tip must demonstrate some indicia of reliability. This harkens back to the objective standard of reasonableness imposed by *Terry*. In the words of the *Adams* opinion:

> Some tips, completely lacking in indicia of reliability, would either warrant no police respons or require further investigation before a forcible stop of a suspect would be authorized.

Adams v. Williams, supra at 147. Obviously, we are bound by the holdings in both *Terry* and *Adams*.

Our own case of *State v. Gluck, supra,* is consistent with the approach of the United States Supreme Court since it requires a well founded suspicion to justify an investigative stop.

The fact that the anonymous tipster accurately described the defendant's vehicle is not such corroboration or indicia of reliability as to make reasonable the officers' action. This is the direct holding of *Whiteley v. Warden of Wyoming State Penitentiary,* 401 U.S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031 (1971). Nor is the fact that contraband was discovered after the stop constitutionally sufficient. A seizure is not justified by what a subsequent search discloses. *Henry v. United States,* 361 U.S. 98, 4 L. Ed. 2d 134, 80 S. Ct. 168 (1959).

The Court of Appeals aptly summarized the controlling principle and conclusion:

> It is difficult to conceive of a tip more "completely lacking in indicia of reliability" than one provided by a completely anonymous and unidentifiable informer, containing no more than a conclusionary assertion that a certain individual is engaged in criminal activity. While the police may have a duty to investigate tips which sound reasonable, absent circumstances suggesting the informant's reliability, or some corroborative observation which suggests either the presence of criminal activity or that the informer's information was obtained in a reliable fashion, a forcible stop based solely upon such information is not permissable.

State v. Lesnick, supra at 285:

To this point our opinion has essentially followed the analysis and rationale of the Court of Appeals. We now emphasize a matter of some importance. The state, in its petition for review, alleges that law enforcement will no longer be able to make even reasonable and limited inquiries into possible criminal conduct based upon the tips of informants. Such is not at all the result of this holding. Both *Terry* and *Adams* emphasize that no single rule can be fashioned to meet every conceivable confrontation between the police and citizen. Evaluating the reasonableness of the police action and the extent of the intrusion, each case must be considered in light of the particular circumstances facing the law enforcement officer. In this case, the suspected crime was a gross misdemeanor. It posed no threat of physical violence or harm to society or the officers. Indeed it involved only an activity which was so openly tolerated in some areas that taxes were collected on the business of persons such as the defendant. This is quite a different matter from the hypothetical tips involving murder or threatened school

bombings which were used by the state in its argument to illustrate the purported result of the holding of the Court of Appeals. While we are obviously not passing upon such matters, we do emphasize that if and when other cases arise they will necessarily be judged in light of their particular facts, which is the very clear, basic premise of *Terry* and *Adams*.

On the state's cross-appeal, we adopt the holding and language of the Court of Appeals, *State v. Lesnick, supra* at 285:

> The state cross-appeals from the order of the trial court directing the return to defendant of certain merchandise seized along with the gambling devices from his vehicle. The position of the state is that this merchandise could be used as prizes or awards in gambling activities, and thus that it should be destroyed under the authority of former RCW 9.47.110, which provides:
>
> Seizure and disposition of gambling devices. It shall be the duty of all peace officers to search for and seize all tables, slot machines, or other article, machine, device or apparatus of the kind commonly used for gambling, or operated for the winning or losing of money or property, or any representative of either, upon any chance or uncertain or contingent event, and all property useful in the operation or maintenance of a bucket shop, and take the same before a magistrate. If in the judgment of such magistrate any of such articles may be useful as evidence in the trial of any case, he may order the same held for such trial or delivered to the prosecuting attorney; otherwise, he shall order the same to be forthwith destroyed. After the final hearing and disposition of any case in which

> any of said articles may be held or used as evidence, whether such case result in a conviction or acquittal, the magistrate or judge having jurisdiction of such case shall forthwith order all such articles destroyed.
>
> We agree with defendant that this statute, being penal in nature, should be strictly construed. *State v. Boyer,* 4 Wn. App. 73, 480 P.2d 257 (1971). We are of the view that the trial court correctly distinguished between gambling devices "per se," clearly within the purview of the statute, and mere merchandise which "could have" been used for prizes. The gambling devices are subject to RCW 9.47.110 and will be destroyed upon the remittitur.

The judgment of the Court of Appeals is affirmed.

Brachtenbach, J.

WE CONCUR:

FINLEY, J.
ROSELLINI, J.
STAFFORD, J.
UTTER, J.

43141—State v. Lesnick
Majority by Brachtenbach, J.
Dissent by Hale, C.J.

No. 43141

HALE, C.J. (dissenting)—A trial is a quest for the truth. Facts are not truth, but only evidence of it. I would no more suppress the evidence than I would the truth. What are the facts upon which the court suppresses the evidence in this case?

Someone, identity unknown, telephoned the Kelso police station and told the officer on duty that the driver of a van and trailer was attempting to sell punchboards in the city. He gave the police a description of the van and its license plate number, but refused to identify himself or the source of his information.

Chief Thorpe and Sergeant Eby of the Kelso police were in the station when the call came in. Two other officers were sent to one section of the city to look for the van, trailer and punchboards, and Chief Thorpe and Sergeant Eby took another area. They found the described van and trailer in the parking lot of a private club, saw that its license number, except for some transposed numerals, was similar to that reported by the anonymous caller. Parking their car on an adjacent city street, the officers kept the van and trailer under observation and, when shortly thereafter the rig was driven from the parking lot onto the street, the officers followed it in their car. The two officers drove behind it for a block and a half and, using the police siren and flasher lights, signaled the van's driver over to the curb. Nothing that the officers saw up to the moment of stopping the van gave any indication of the

commission of any offense, traffic or otherwise.

Now come the critical facts. The chief asked to see the diver's license, and the driver produced it for him. Then, while walking to the front of the van to check its license plate, the chief looked through the driver's window and saw the load of punchboards in it. What the police officer saw through the window is what is suppressed as evidence now.

One of the many strange principles of so-called constitutional law to emerge in the last 15 or 20 years is that a police officer, standing on a public street, cannot look through the windows of an automobile on the public street and give evidence of its contents unless he has received some evidence that the vehicle is being or has been used in the commission of a crime. If the policeman's attention is drawn to the automobile other than by accident, he is held accountable as for some kind of misbehavior or violation of constitutional principles, and should he observe in the automobile such curious things as a submachine gun, a bloody corpse with a wound in the head, a bag of marijuana, or a container holding a substance having the appearance of heroin or other contraband drug, the constitution, it is said, not only blinds the policeman from his view but seals his lips at trial.

Whatever rules the judiciary now purport to lay down concerning the brief detention and inspection of automobiles on the public streets by sworn officers of the law, I find not the remotest connection between such rules and the constitutions. So bizarre are the results of this case that, if one indulges the presumption that every sane man must be presumed to know the law, the defendant himself can readily be suspected of making the anonymous telephone

call so as to assure himself either free passage out of town with his contraband if not apprehended, or to a certain acquittal if he was.

The constitutions say:

> The right of the people to be secure in their *persons, houses, papers,* and *effects,* against *unreasonable* searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(Italics mine.) U.S. Const. amend. 4.

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Const. art. 1, § 7.

Although we have long since departed the era of strict construction and are squarely committed to the philosophy of liberal construction, the fact remains that our constitutions are written documents and what the courts say about them should have some connection—however remote—with their words and phrases. Even the loosest constructionist cannot rationally ignore that the constitutions do mention searches and seizures in writing. The Fourth Amendment was adopted to secure individuals "in their *persons, houses, papers,* and *effects,* against *unreasonable* searches and seizures." (Italics mine.) It would require a vaporous and untenable construction to find in these charters any reference to the colonial equivalent of an automobile or truck moving or standing upon the public streets. Where the constitution speaks of one's house, *person* and effects, the absence of words and phrases

giving protection to colonial transport such as wagons, carriages, horses, harness and saddle bags, while moving or standing upon the roads, streets and highways, must have been intentional. Failure to clothe these chattels with the same immunity is, I think, both conspicuous and noteworthy. If the founders of the constitution had thought that individuals were entitled to a running start out of town with their contraband or evidence of crime, or that the constitutions gave their wagons, carriages, horses, harness and saddle bags some kind of immunity from the sheriffs' or constables' observations, they could readily have written it into the constitution. Instead, they chose the narrower and to me far more sensible doctrine of treating one's house as his castle but even then allowing all *reasonable* searches and seizures with respect to it.

What has grown up in this country, thus, is not a body of judicial precedent sustaining and applying the Fourth Amendment, but a massive agglomeration of judicial rules for playing what might be called search tag, rules it seems to me in a constant state of flux and ferment and having little or nothing to do with constitutional rights and immunities. Sometimes the police win; frequently they lose. Sometimes the contest deteriorates, so far as the jury's view of the evidence is concerned, into a kind of law-inspired shell-game—now they see it, now they don't.

In a plethora of irreconcilable precedent producing the inevitable gross quantum of judicial hair-splitting, the courts seem unable to recognize the almost total lack of identity between one's automobile parked on or moving along a public street, and one's house, person and effects. The legislature,

however, to the contrary, has long recognized the difference between the two and enacted many statutes which, while readily applicable to automobiles, could not, under the Fourth Amendment, sensibly be applied to one's house, person and effects. An automobile is—and most anyone will affirm it ought to be—a highly regulated device whose operation upon the public streets is held to be closely identified with the public interest and one which directly affects the public safety and welfare.

As a device subject to intense regulation, an automobile on the public streets and ways should bear little relationship under the law of search and seizure to one's house. This distinction was made clear in *Chambers v. Maroney,* 399 U.S. 42, 48, 26 L. Ed. 2d 419, 90 S. Ct. 1975 (1970), *rehearing denied,* 400 U.S. 856, 27 L. Ed. 2d 94, 91 S. Ct. 23 (1970), in commenting, *inter alia,* upon the earlier case of *Carroll v. United States,* 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280 (1925), where it was said that an automobile may be searched without a warrant in circumstances that would not justify the search of a house or an office without a warrant. The conclusion is inescapable, even when probable cause is a requisite, that the standards for probable cause are much more liberal and wider latitude is allowed in the search of a vehicle than in the search of a house or an office. What may be an unreasonable search of a house may be reasonable in the case of a motor car. *State v. Gluck,* 83 Wn.2d 424, 427, 518 P.2d 703 (1974).

For example, one need not be licensed to occupy a house or apartment fronting upon a public street, but he must have a driver's license in his possession "at all times when operating a motor vehicle and

shall display the same upon demand to any police officer." RCW 46.20.190. Assuming arguendo, that a police officer cannot, under this statute, stop a motorist solely for the purpose of determining whether he has a valid driver's license, he would, nevertheless, have authority to stop the motorist for any infraction amounting to a misdemeanor committed in the officer's presence or in his view, or upon reasonable grounds that the driver has committed a felony. Any authorized stop of the vehicle, it should be said, authorizes the officer to demand that the operator's license be exhibited.

But that is only the beginning of the regulatory measures for automobiles. We have statutes requiring that motor vehicles themselves must be licensed, and a certificate of license registration authenticated with the owner's signature must be carried in the vehicle at all times and "Any person in charge of such vehicle shall, upon demand of any of the local authorities or of any police officer . . . permit an inspection of such certificate of license registration." RCW 46.16.260. Thus, a search of an illegally parked automobile by police, to inspect its certificate of registration conducted in the absence of its driver, which revealed evidence of a burglary upon which a warrant was obtained for the search of a house was held good in a case pointing out the differences under the constitution between one's house and his automobile. *See State v. Woods,* 3 Wn. App. 420, 475 P.2d 573 (1970). And other valid regulatory measures are in effect pertaining to vehicular registration, capacity, equipment and safety devices.

There is no true constitutional parallel between one's house and his car on the public streets. Where one living in rented premises shall be free from un-

reasonable searches and seizures, if he drives a borrowed or rented automobile on the public streets he must obtain or someone else must have obtained for it a certificate of ownership. RCW 46.12.010. Aside from building and inspection codes, where the constitutions can be said to deny the state power to demand a license as a condition to living in one's house, no such ban prohibits the licensing of motor vehicles. And while on the subject of regulating motor vehicles, one must mention the inevitable legislation to be enacted providing for the installation of air pollution devices and their inspection—legislation which will be virtually impossible to enforce under the aegis of the instant case. Nor should we overlook the comprehensive legislation providing for the stopping and searching of vehicles without a warrant under the fish and game code. RCW 75.08.-170; 75.36.010; 77.12.090. These statutes are already doomed by the precedential effect of the instant opinion.

The police should have won this game of search. Good, sound, cogent evidence like the truth itself should never be suppressed. But even if the rules of the game are to control, they do not, as a matter of law, actually bar the evidence in this case. The court now holds that the police officer had no legal right to be on the public streets in juxaposition to the defendant's van because they had signaled its driver to stop on the basis of an anonymous tip. Had they momentarily stopped the vehicle without ostensible reason and without pretext, it follows under the instant holding that the prosecution would be in a much stronger position than it now is with the tip. In other words, if the police, while strolling past or driving past the van had looked inside it and seen

the contraband, the seizure would have been good, but having done so in response to an anonymous tip the seizure is held bad. Thus, the anonymous telephone caller rendered a valuable service to the defendant by immunizing his vehicle from all search after delivery of the tip so long as the van thereafter was operated without violation of the traffic code.

The two police officers should not be put under any legal disability by the anonymous call but, to the contrary, as officers of the law sworn to protect the public, I think they should be held duty bound to respond to it. The courts ought not foster nor would I concur in the adoption of a rule that the police are obliged to ignore anonymous telephone calls when an excited voice tells the desk sergeant that very suspicious conduct is observed, or what looks to be a crime has been or is being or is about to be committed and the caller, whether reasonably or unreasonably, is fearful of making his or her identity known. I think it both bad law and bad police procedure for the police to answer that they will not respond to anonymous telephone calls because they can make no inquiries at the scene under pain of having all subsequently obtained evidence suppressed, or being charged with illegal procedures. Police officers, as sworn officers of the law, I think, are bound to investigate all substantial and plausible complaints of criminal activities coming to their attention (*see State v. Twitchell,* 61 Wn.2d 403, 378 P.2d 444 (1963)), except those of the most errant nonsense. While it would be better that every informant identify himself and the source of his information, his refusal to do so, in my opinion, does not relieve the police of their responsibilities to respond to calls for help.

Just what response should the police make to an anonymous telephone call that a bomb has been planted in a school; or that it looks to the caller that someone is being forcibly taken as hostage into an automobile; or that there is some suspicious activity taking place outside or inside a bank or supermarket? Does the initial investigation undertaken without further cause seal out crucial evidence of crime thereafter obtained?

Thus, in this case, even if it may be discerned in the mass of judicial precedent that the initial stopping of the car had been illegal, the seizure, nevertheless, should be held lawful and the evidence good for two sound reasons: (1) the commission of an offense in the presence of the officer, *i.e.*, possession of gambling paraphernalia within sight and sound of the two police officers, and (2) seizure of contraband while it was in plain view of the officers. As I understand the facts of this case, we are not concerned with whether the officers had probable cause to search the van, but merely with their authority to stop it momentarily as it moved upon the public streets. Once having detained it, they clearly had good and sufficient cause to seize its contraband contents and arrest the driver for possessing it because the incriminating goods lay there in plain sight of the officers and in the defendant driver's immediate presence. And on this point, I think the law is clear and to the point: The momentary stopping and detention of a motor vehicle by police officers, even though not involved in any apparent violation of law, should not be held to constitute an arrest.

From a massive mishmash of legal precedent relating to searches and seizures, there can be located,

I think, a few principles which, if straightforwardly stated, may readily be applied by policemen and trial judges and which neither deprive the individual of his freedom from *unreasonable* searches and seizures nor prevent a policeman from doing his sworn duty. First, there is the general principle that an automobile, being movable and a ready device for the commission of and flight from and concealment of a crime, does not have the same standards of constitutional protection as does a house or office. What is probable cause to search and seize an automobile may not rise to the standards of probable cause for the issuance of a warrant to search a house. *Carroll v. United States,* 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280 (1925); *Chambers v. Maroney,* 399 U.S. 42, 26 L. Ed. 2d 419, 90 S. Ct. 1975 (1970); *State v. Glasper,* 84 Wn.2d 17, 523 P.2d 937 (1974).

Next comes the general rule that a mere stopping and momentary detention of an individual or a vehicle upon the public streets by legitimate police officers does not constitute an arrest. This principle is stated and restated in *Wilson v. Porter,* 361 F.2d 412, 414-15 (9th Cir. 1966), as follows:

> While it is clear that at the time appellee's car was pulled over probable cause for an arrest did not exist, it is also clear that not every time an officer sounds his siren or flashes a light to flag down a vehicle has an arrest been made. The initial act of stopping appellee's car was not an arrest. Granting that the constitutional prohibition against unreasonable searches and seizures makes no distinction between informal detention without cause and formal arrest without cause, there is a difference between that "cause" which will justify informal detention short of arrest and the probable cause standard required to justify that kind of custody tradi-

> tionally denominated an arrest. Our concern here is what degree of cause will justify cursory, informal detention in circumstances which would not justify an arrest, and whether the officers met that standard in the particular circumstances of this case.

(Footnotes omitted). Again, in *Wilson v. Porter,* at page 414-15, it was said:

> We conclude that no right of the appellee was violated when the officers stopped the car and that the subsequent seizure of the evidence upon which he was convicted was justified as pursuant to a lawful arrest.

and

> We take it as settled that there is nothing ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purposes of limited inquiry in the course of routine police investigations. Rios v. United States, 364 U.S. 253, 80 S. Ct. 1431, 4 L.Ed.2d 1688 (1960); Busby v. United States, 296 F.2d 328 (9th Cir. 1961). A line between reasonable detention for routine investigation and detention which could be characterized as capricious and arbitrary cannot neatly be drawn. But due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers could have had reasonable grounds for their action. A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing.

and approved in *United States v. Brown,* 436 F.2d 702 (9th Cir. 1970).

In *United States v. Bonanno,* 180 F. Supp. 71 (S.D. N.Y. 1960), it was said:

> While the Fourth Amendment may be construed as encompassing "seizure" of an individual, it cannot be contended that every detention of an individual is such a "seizure". If that were the case, police investigation would be dealt a crippling blow, by imposing a radical sanction unnecessary for the protection of a free citizenry. Under such a theory, a policeman could not stop and question a person standing next to a bloody corpse. If he did so, before having probable cause to believe that he had committed the crime, and then released him, and subsequently decided on the basis of further checking into the individual's activities that he was likely to be the murderer, the policeman could not testify to the presence of the suspect in the vicinity of the victim because it would be testimony about matters learned upon an "illegal arrest".

(Footnotes omitted.) and,

> It is clear, that the mere stoppage of a car by a police officer is not such an illegal act that would taint all evidence stemming therefrom.

United States v. Bonanno, supra, at 78, 80.

If "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest" as was said in *Terry v. Ohio,* 392 U.S. 1, 22, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), and as stated in *Adams v. Williams,* 407 U.S. 143, 146, 32 L. Ed. 2d 612, 92 S. Ct. 1921 (1972), "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time," and if the so-called stop-and-frisk statutes

are not repugnant to the Fourth Amendment when not oppressively applied, then it follows that the brief stopping of a vehicle moving upon the public streets even without probable cause to believe its occupants have committed, are committing, or are fleeing from the scene of a crime, likewise does not violate the Fourth Amendment prohibition against unreasonable search and seizure.

This court addressed itself to the very question of whether the momentary stopping of a motor vehicle moving upon the public streets violates the rules against unreasonable searches and seizures in *State v. Gluck,* 83 Wn.2d 424, 426, 518 P.2d 703 (1974), where we said:

> Defendant first challenges the legal justification for the initial stop by the officers. The stopping of vehicles for traffic or general investigation has been specifically held to be non-custodial in nature. *Lowe v. United States,* 407 F.2d 1391 (9th Cir. 1969); *Jennings v. United States,* 391 F.2d 512 (5th Cir. 1968). It has also been held that traffic enforcement officers may stop motorists for routine checks, and such stopping does not amount to an arrest or unlawful stopping. *United States v. Bonanno,* 180 F. Supp. 71 (S.D. N.Y. 1960), *rev'd on other grounds sub nom., United States v. Bufalino,* 285 F.2d 408 (2d Cir. 1960); *McCarthy v. United States,* 264 F.2d 473 (8th Cir. 1959); *Smith v. United States,* 264 F.2d 469 (8th Cir. 1959). It follows, therefore, that where officers entertain a well-founded suspicion not amounting to probable cause, they may stop the suspected person, identify themselves and require the suspect to identify himself and explain his activity without being adjudged to have made a formal arrest. *State v. Rankin,* 477 S.W.2d 72 (Mo. 1972); *United States v. Bonanno, supra* at 80.

The massive quantum of judicial precedent relating to search and seizure, much of it conflicting and irreconcilable, should be returned to its earlier established constitutional line of departure in accordance with the observation made in *Elkins v. United States,* 364 U.S. 206, 222, 4 L. Ed. 2d 1669, 80 S. Ct. 1437 (1960), and repeated in *Terry v. Ohio, supra,* that "what the constitution forbids is not all searches and seizures but unreasonable searches and seizures." Thus, *Whiteley v. Warden, Wyoming State Penitentiary,* 401 U.S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031 (1971), relied upon by the court as authority for suppressing this evidence, I think inapposite. That case concerned the question of whether information given by an anonymous tipster describing the defendant's vehicle had sufficient evidence of reliability to support the issuance *of an arrest warrant.* But that court decision does say that where the

> initial impetus for an arrest is an informant's tip, information gathered by the arresting officers can be used to sustain a finding of probable cause for an arrest that could not adequately be supported by the tip alone. *Draper v. United States,* 358 U.S. 307 (1959). See *Spinelli v. United States,* 393 U.S. 410 (1969). But the additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in *Draper* itself, were in the process of committing the felony.

That statement of principle fills the bill here. The Kelso police, acting under an anonymous tip, which proved to be partly corroborated by the appearance and license number of defendant's vehicle, did no more than briefly detain the vehicle. At that point,

it was not an arrest. Then, while standing where police officers not only have a right, but are frequently under a duty to be, *i.e.*, on the public streets, with their own eyes they saw the defendant in perpetration of a gross misdemeanor, *i.e.*, in knowing possession of illegal gambling paraphernalia.

This brings the case squarely, I think, under the principle stated in *Wilson v. Porter, supra,* at 414, that "no right of the appellee was violated when the officers stopped the car and that the subsequent seizure of the evidence upon which he was convicted was justified as pursuant to a lawful arrest."

The mere stopping of a car by a police officer, in the absence of evidence of a systematic scheme to harass, hinder or annoy the driver or passenger, should not, I think, be deemed such an illegal act so as to taint all evidence stemming from it. The stopping of a vehicle upon the public streets is a noncustodial detention. *See United States v. Bonanno, supra,* and *State v. Gluck, supra.*

This brings us to the application of the commonsense, plain-view rule. Since the police officers were on the public streets where their duty could be said to take them, they were under another duty to prevent the commission of any crimes taking place in their presence or to seize any evidence of crime in plain view. *State v. Twitchell,* 61 Wn.2d 403, 378 P.2d 444 (1963). That, of course, is not only a principle of constitutional law but has the glorifying quality of commonsense, a characteristic frequently wanting in latter-day dissertations on the constitutions.

We should, therefore, adhere to our holding in

State v. Martin, 73 Wn.2d 616, 440 P.2d 429 (1968), that:

> No search under the constitutional interdiction takes place when items having evidentiary value are outside a building and in plain view, nor if they are in plain sight inside a building to which access has been lawfully gained. *See State v. LaPierre,* 71 Wn.2d 385, 428 P.2d 579 (1967), and cases cited therein. *See also* 47 Am. Jur., *Search and Seizure* §20 (1943).

and as we again said in *State v. Regan,* 76 Wn.2d 331, 336, 457 P.2d 1016 (1969):

> A police officer is not required to ignore items of possible evidentiary value which are in plain sight. As stated in *Harris v. United States,* 390 U.S. 234, 236, 19 L. Ed. 2d 1067, 88 S. Ct. 992 (1968) (per curiam):
>
> > It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. *Ker v. California,* 374 U.S. 23, 42-43 [10 L. Ed. 2d 726, 83 S. Ct. 1623] (1963); *United States v. Lee,* 274 U.S. 559 [71 L. Ed. 1202, 47 S. Ct. 746] (1927); *Hester v. United States,* 265 U.S. 57 [68 L. Ed. 898, 44 S. Ct. 445] (1924).
>
> *See also State v. Poe,* 74 Wn.2d 425, 445 P.2d 196 (1968); *State v. Sullivan,* 65 Wn.2d 47, 395 P.2d 745 (1964); *State v. Brooks,* 57 Wn.2d 422, 357 P.2d 735 (1960).

Thus, a police officer not only is not required to ignore items of possible evidentiary value which are in plain view (*State v. Glasper, supra*), but he may seize without a warrant any objects within his plain view that he has reasonable cause to believe are con-

traband. *State v. Day,* 7 Wn. App. 965, 503 P.2d 1098 (1972).

I would accordingly, reverse the Court of Appeals and affirm the judgment of the Superior Court.

HALE, C.J.

I concur in the result of the dissent.

HAMILTON, J.

I concur with dissent.

HUNTER, J.
WRIGHT, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent,* v. CHARLES E. LESNICK, *Appellant.*	No. 724-II Division Two Filed Dec. 28, 1973

PEARSON, C.J.—Defendant, Charles E. Lesnick, appeals from a conviction of the crime of possession of gambling devices, a gross misdemeanor. At trial defendant sought suppression of certain punchboards and other gambling paraphernalia as being the product of an unlawful search of his vehicle. The trial court admitted the evidence, holding that the contraband fell into the "plain view" of officers who had detained defendant for investigation. In the opinion of the trial court, the initial stop of the defendant by police, upon information supplied by an anonymous phone caller, was a permissible "investigative detention" within the doctrine of *Terry v. Ohio,* 392, U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) and its progeny. We reach the opposite conclusion upon this determinative issue, and reverse.

On October 23, 1970, the City of Kelso police department received a phone call, advising that there was in the city a white Ford van, pulling a U-Haul trailer, the driver of which vehicle was attempting to sell "punchboards" in the city. The caller also sup-

plied a license plate number. At no time did this caller identify himself.

Upon receipt of this information, Kelso Police Chief Thorpe advised officers of the department to search the city for the described vehicle. Chief Thorpe and Sergeant Eby participated in this search, and soon located the described van and trailer in a private club parking lot. They drove to within a short distance of the subject vehicle, and observed that its license number was similar to that given by the informer, though some numerals were transposed. The officers parked their car on an adjacent city street and remained to observe the suspect vehicle. Shortly thereafter, the van was driven from the parking lot onto the street. The officers followed the vehicle for a block and a half, then pulled it over with siren and lights. Up to this point the officers observed neither traffic violations nor any other indications of criminal activity on the part of the vehicle's driver.

Upon stopping, defendant alighted from the van, walked toward the police car, and met Chief Thorpe and Sergeant Eby near the rear of the van. Chief Thorpe identified himself and requested identification papers from defendant, who produced a driver's license. The chief handed the license to Eby, walked to the front of the van to check the license plate, and observed gambling paraphernalia through the driver's window. Defendant was then placed under arrest for possession of gambling devices. (RCW 9.47.030, repealed Laws 1st Ex. Sess. 1971, ch. 280 § 23.) His vehicle was towed to the police station and searched pursuant to a warrant. A large number of gambling devices, plus certain merchandise, was seized.

Defendant contends that his forcible stop by the Kelso police was an arrest. The state concedes, as it must, that no probable cause to arrest defendant existed at the time his vehicle was stopped. *See State v. Chatmon,* 9 Wn. App. 741, 515 P.2d 530 (1973). It is well settled, however, that police may adopt an intermediate response between actual arrest and the rejection of any information which falls below the level of probable cause. The police may, under appropriate circumstances, forcibly detain persons for the purpose of limited investigation of possibly criminal activity, although no probable cause to arrest exists. *Terry v. Ohio, supra.*

While *Terry v. Ohio* involved first-hand observations of suspicious activities by an experienced officer, the United States Supreme Court has specifically rejected the argument that reasonable cause for an investigative stop can only be based upon such personal observation, rather than on information supplied by another person. *Adams v. Williams,* 407 U.S. 143, 32 L. Ed. 2d 612, 92 S. Ct. 1921 (1972).

The standard against which an informant's tip must be measured for the purpose of supporting an investigative detention is less rigorous than that required by a probable cause analysis. *See State v. Chatmon, supra; cf. State v. Simms,* ..... Wn. App. ....., ... P.2d ..... (filed December 5, 1973). Nonetheless, the tip must demonstrate some "indicia of reliability." As said in *Adams v. Williams, supra*:

> Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or re-

> quire further investigation before a forcible stop of a suspect would be authorized. But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response.

407 U.S. at 147.

We are of the opinion that the tip in the present case bore none of the "indicia of reliability" contemplated by *Adams v. Williams*. Here the informant was completely anonymous. He proffered no information about himself nor afforded the officers any information from which they could infer his truthfulness.[1] These facts contrast strikingly with those in *Adams v. Williams*:

> [W]e believe that Sgt. Connolly acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past. *This is a stronger case than obtains in the case of an anonymous telephone tip.* The informant here came forward personally to give information that was immediately verifiable at the

1. We recently observed, by the way of dictum, that an investigative detention may in some instances be based upon information supplied by a nameless informant. *State v. Chatmon*, 9 Wn. App. 741, 515 P.2d 530 (1973). We adhere to this view, in the context of the factual pattern in that case. In *Chatmon*, the informant, while refusing to identify himself, came forward personally to the military police to relate his information. Moreover, he appeared to be an ordinary citizen, and his description of how he came about his information was extremely detailed and specific. Such circumstances, we believe, may impart "indicia of reliability" to the tip of an otherwise nameless informer. In the case of an unidentified phone caller, however, the cloak of anonymity is complete.

> scene. Indeed, under Connecticut law, the informant might have been subject to immediate arrest for making a false complaint had Sgt. Connolly's investigation proved the tip incorrect. Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, see, e.g., Spinelli v United States, 393 US 410, 21 L Ed 2d 637, 89 S Ct 584 (1969); Aguilar v Texas, 378 US 108, 12 L Ed 2d 723, 84 S Ct 1509 (1964), the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.

(Footnote omitted. Italics ours.) 407 U.S. 146, 147.

Moreover, the collateral detail of the anonymous tip was merely descriptive in nature. Corroboration of this detail justified the officers only in concluding that the subject vehicle was, indeed, the vehicle described by the unknown informant. *See Whiteley v. Warden of Wyo. Penitentiary*, 401 U.S. 560, 28 L. Ed. 2d 306, 91 S. Ct.1031 (1971). As *Whiteley* points out, corroboration of such information, where it does not in itself suggest criminal activities, supports neither an inference that the informant is reliable nor that his conclusion that criminal activities are afoot was reliably reached. 401 U.S. at 567. Hence, the pre-detention observations of Chief Thorpe and Sergeant Eby here imparted no "indicia of reliability" to the anonymous information.

A distinction must be made between merely *descriptive* information which enables the officers to simply determine the identity of the subject, and a tip which incorporates detailed *predictive* information about a suspect's movements, which may, upon corroboration, justify a conclusion that the inform-

er was privy to the suspect's activities. Such a conclusion may support an inference that the informer's information was obtained in a reliable way. *See Draper v. United States,* 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329 (1959), and *State v. White,* ..... Wn. App. ....., ... P.2d ..... (Opinion filed December 26, 1973)).

It is difficult to conceive of a tip more "completely lacking in indicia of reliability" than one provided by a completely anonymous and unidentifiable informer, containing no more than a conclusionary assertion that a certain individual is engaged in a criminal activity. While the police may have a duty to investigate tips which sound reasonable, absent circumstances suggesting the informant's reliability, or some corroborative observation which suggests either the presence of criminal activity or that the informer's information was obtained in a reliable fashion, a forcible stop based solely upon such information is not permissible.

The state cross-appeals from the order of the trial court directing the return to defendant of certain merchandise seized along with the gambling devices from his vehicle. The position of the state is that this merchandise could be used as prizes or awards in gambling activities, and thus that it should be destroyed under the authority of former RCW 9.47.110, which provides:

> Seizure and disposition of gambling devices. It shall be the duty of all peace officers to search for and seize all tables, slot machines, or other article, machine, device or apparatus of the kind commonly used for gambling, or operated for the winning or losing of money or property, or any representative of either, upon any chance

> or uncertain or contingent event, and all property useful in the operation or maintenance of a bucket shop, and take the same before a magistrate. If in the judgment of such magistrate any of such articles may be useful as evidence in the trial of any case, he may order the same held for such trial or delivered to the prosecuting attorney; otherwise, he shall order the same to be forthwith destroyed. After the final hearing and disposition of any case in which any of said articles may be held or used as evidence, whether such case result in a conviction or acquittal, the magistrate or judge having jurisdiction of such case shall forthwith order all such articles destroyed.

We agree with defendant that this statute, being penal in nature, should be strictly construed. *State v. Boyer,* 4 Wn. App. 73, 480 P.2d 257 (1971). We are of the view that the trial court correctly distinguished between gambling devices "per se," clearly within the purview of the statute, and mere merchandise which "could have" been used for prizes. The gambling devices are subject to RCW 9.47.110 and will be destroyed upon the remittitur.

Judgment affirmed in part, reversed in part.

PEARSON, C.J.

WE CONCUR:

ARMSTRONG, J.
PETRIE, J.

APPENDIX C

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF COWLITZ

STATE OF WASHINGTON,
Plaintiff,

vs.

CHARLES LESNICK,
Defendant.

FILED
Superior Court
Dec. 20, 9:42 a.m., '71
Cowlitz County
Mike Neslon, Clerk
By A. H.

No. 4312

MEMO-
RANDUM
OPINION

This matter was heard by the Court on the basis that if certain critical evidence were admissable in the case the uncontested conclusion would be that the defendant would be guilty of the crime as charged by the Information. The Court therefore has considered the defendant's motion to suppress the evidence during the trial and makes the following analysis and ruling.

The evidence disclosed that the Kelso police acting on an anonymous informant's tip which was called in to Officer Gibbler, the dispatcher, proceeded to locate a white Ford Econoline van towing a U-Haul trailer. The information received was to the effect that someone was selling gambling punchboards in the City of Kelso, Washington and gave the license number as Washington AO 8905.

A vehicle answering this description was observed by Chief John Thorpe in the Elk's Club parking lot a short while later. He drove within a few feet of the van in the lot and stopped in the adjacent

street to obtain license number verification by radio. Apparently one of the numerals was transposed or wrong. While so stopped the subject vehicle driven by defendant left the parking lot proceeding on to 8th Street a few blocks and then a right on Allen Street where the police stopped the vehicle by means of red lights and siren.

The reason given for the stop by Chief Thorpe was "primarily to stop and identify the driver" and secondarily "to prove the reliability of the information received from the informant." It is admitted that no traffic violation was observed up to the time of stopping the defendant.

The evidence is in dispute as to what occurred and was said at the side of the van between Chief Thorpe and defendant Lesnick. The Court believes the defendant spoke first asking "what's up" and the Chief then asked for his identification, specifically driver's license, which defendant failed to produce immediately. He attempted to satisfy the identification by other cards as he testified his license was expired. The Court does not believe the Chief immediately announced defendant was under arrest upon alighting from the van.

The Chief handed the driver's license to Officer Eby, who was assisting, and then went to the front of the van to check the license number and looked into the van through the driver's window and also the windshield. Two reasons were given for this: (1) to see if anyone was inside for personal safety of the officers and (2) to see what was in the van. At this point Chief Thorpe personally observed gambling paraphernalia—specifically punchboards in the van. He then placed the defendant under ar-

rest, advised him of his rights, returned to the station, obtained a search warrant and entered the van. There he found the exhibits which, if admissible in evidence, would disclose a violation of the following statutes and ordinances: RCW 9.47.030; Kelso City Ordinances 8.32.040 and 8.32.070.

The key query is: Were the police officers entitled to stop the defendant and make inquiry of him under the circumstances, and once having done so could they arrest him for having observed a misdemeanor being committed in their presence; to wit: possession of gambling devices?

Although there is apparently no statute in Washington which grants city police the right to stop a vehicle to check for operator's license, can they do so under what might be termed their ordinary criminal investigatory powers?

Here the informant's tip provided the following information: the type of criminal conduct involved, the type and color of vehicle involved, its license number and the general area involved. The cases that have discussed the question since *Terry v. Ohio,* 392 U.S. 1 seem to allow investigative stops when based on specific information obtained from an informers' tip. See *White v. U.S.* and *Nicholas* v. *U.S.,* recent 8th Circuit cases decided September 9, 1971. Also *U.S. v. Harflinger,* 436 F.2d 928 (8th Cir. 1970) and *Carpenter v. Sigler,* 419 F.2d 169 (8th Cir. 1969).

How is the reasonableness of the stop to be determined bearing in mind the individual's constitutional right to proceed freely in our society. In *Terry* v. *Ohio, supra,* the Supreme Court indicated the circumstances under which a police officer is justified

to make an investigative stop can be less than those required to make an arrest. It was further stated in terms as whether the officers observations led him to reasonably conclude in light of his experience that criminal activity may be afoot.

From the facts and information available to Chief Thorpe and the rational inferences to be reasonably drawn therefrom, there appeared to be a substantial possibility that a crime had been or was being committed and that the defendant was likely to be the person who committed, was committing, or was planning to commit the offense. It is necessary to keep in mind that the subsequent arrest occurred as a result of what was in plain view of Chief Thorpe and not due to an unlawful unwarranted search. On these facts *State v. Michaels,* 60 Wn. 2d 639 is not considered controlling since it involved an "unwarranted search" obtained by pretext.

The testimony of Chief Thorpe was that prior to seeing the contents of the van the defendant was not under arrest although he was not free to leave until he identified himself. The need for the investigative stop became significant as the van began to leave the area and unless detained, no information regarding the identity of the person operating the vehicle could be obtained without the substantial risk of losing contact. Time and the circumstances did not permit obtaining even a John Doe Warrant.

Therefore, the Court holds that a brief detention of a vehicle for reasonable inquiry under the circumstances of this case is not necessarily an arrest violative of the 4th Amendment's proscription against unreasonable searches and seizures although a later observation made as a result thereof may have constituted probable cause for arrest. In making this ruling the Court is mindful of the traditional distinction between felonies and misdemeanors. To hold otherwise would effectively impede and thwart the officer's duty to detect crime as well as to apprehend a criminal. The circumstances under which the stop is justified provide the crucial test of whether the police officer acted reasonably or unreasonably. Here, it appears it was.

Accordingly, the motion to suppress is denied and the evidence proffered is admitted.

Dated this 17th day of December, 1971.

JOHN N. SKIMAS

Judge

Supreme Court, U. S.
FILED
AUG 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1392

STATE OF WASHINGTON,

Petitioner,

—v.—

CHARLES EDWARD LESNICK,

Respondent.

ON CERTIORARI FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent accepts the "Opinions Below", "Jurisdiction", "Constitutional Provisions Involved" and "Statement of the Case" as presented in the Petition for Certiorari.

Questions Presented

The question presented by the State of Washington's Petition for Certiorari is whether police officers may forcibly stop a citizen driving a motor vehicle on a public street, which stop is based solely upon a telephone call from an anonymous person. The caller stated only that there was within the city a described van with a described license plate number pulling a trailer and that the driver of that vehicle was attempting to sell "punchboards" in

the city. The caller remained completely anonymous, refused to identify himself and provided no information as to the source of his knowledge.

History of Proceedings

The petitioner has incorrectly recited the history of the various trial court proceedings and respondent therefore provides the following revised summary.

Charles E. Lesnick, the respondent, was charged on October 26, 1970, with the crime of possession of gambling paraphernalia in Cowlitz County District Court, not a court of record. Thereafter, he filed a motion to suppress the evidence in the case upon the grounds that the evidence was obtained in violation of the Fourth Amendment of the United States Constitution. The motion was granted on December 3, 1970. Petitioner appealed the Order Suppressing Evidence to the Superior Court of the State of Washington for Cowlitz County. After a hearing, the Superior Court, on March 5, 1971, reversed the Order Suppressing Evidence and remanded the case to the Cowlitz County District Court for trial. On April 26, 1971, respondent was tried and convicted of the crime of possession of gambling paraphernalia.

On April 28, 1971, respondent appealed to the Superior Court of the State of Washington for Cowlitz County, and a trial de novo was held on December 7, 1971. The respondent again moved to suppress the evidence upon the basis that there was a violation of the Fourth Amendment of the United States Constitution. By Memorandum Opinion, filed December 20, 1971, the motion to suppress was denied and respondent was convicted of the offense of possession of gambling paraphernalia [Appendix C in *Petition for Certiorari*].

On March 17, 1972, respondent appealed to Division II of the Washington State Court of Appeals. On December 28, 1973, Division II reversed the conviction upon the grounds that respondent's constitutional rights under the Fourth Amendment had been violated [Appendix B in Petition for Certiorari]. Thereafter the State of Washington petitioned Division II for rehearing on modification, which petition was denied on January 31, 1974.

The State of Washington then petitioned the Supreme Court of the State of Washington for review of the decision of Division II of the Washington State Court of Appeals. On March 18, 1974, the petition for review was granted and the case was thereafter argued to the Washington State Supreme Court. On January 7, 1975, the Washington State Supreme Court affirmed the decision of Division II of the Washington State Court of Appeals [Appendix A in Petition for Certiorari]. Thereafter, the State of Washington filed a petition for rehearing with the Washington State Supreme Court, which petition was denied on February 20, 1975. The State of Washington then filed its Petition for Certiorari.

Argument

The argument presented by the State of Washington distorts the holding of the Washington Supreme Court in *State v. Lesnick*, 84 Wash.2d 940, 530 P.2d 243 (1975). The petition for certiorari states (p. 6):

> And yet the Supreme Court of the State of Washington has, by its opinion in this case, indicated that

> the Fourth Amendment to the United States Constitution prohibits law enforcement agencies from making an *investigation* of suspected criminal activity if that investigation involves even a minor and temporary infringement of personal liberties, where that investigation is initiated by an anonymous tip.

Of course, the Washington State Supreme Court did not indicate that law enforcement agencies in the State of Washington are prohibited from making investigations based upon anonymous tips. Rather, *Lesnick* held that a police investigation could not include the forcible stop and detaining of a citizen driving an automobile if the only information which the police had to justify the stop was a telephone call from an anonymous tipster who described a van and trailer each with a described license plate number, and stated that the driver of the van was attempting to sell "punchboards".

The reasoning and holding of *State* v. *Lesnick, supra,* depends upon and is supported by *Adams* v. *Williams,* 407 U.S. 143 (1972) and *Terry* v. *Ohio,* 392 U.S. 1 (1968). As noted by Justice Brachtenbach in *State* v. *Lesnick* at 84 Wash.2d 942, this Court in *Terry* and *Adams* "acknowledged that it is necessary to make a delicate balancing of the interest of society in the enforcement of its laws against the individual's right to protection against unreasonable searches and seizures under the Fourth Amendment." In striving to reach such a balance, the United States Supreme Court determined in *Terry* that police may "stop and frisk" a citizen in situations where police officers' personal observations of suspicious activities by the citizen suggest possible criminal activity and justify further police investi-

gation. In *Adams,* the Court determined that police may "approach and frisk" a citizen in situations where another person provides police with information of possible criminal activity, provided the information demonstrates some indicia of reliability regarding the criminal activity.

In the case at bar, the crucial issue is whether the anonymous tip provided the necessary indicia of reliability to justify the forcible stop of respondent's motor vehicle. In *Adams* v. *Williams, supra,* the situation involving a known informer was distinguished from one involving an anonymous telephone tip (407 U.S. at 146):

> Applying these principles [referring to *Terry* v. *Ohio, supra*] to the present case, we believe that Sgt. Connelly acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past. *This is a stronger case than obtains in the case of an anonymous telephone tip.* [Emphasis added.]

Adams also requires that an "informant's tip must demonstrate some indicia of reliability" (407 U.S. at 147):

> In reaching this conclusion, we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. *Some tips, completely lacking in indicia of reliability, would either warrant no*

police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response. [Emphasis added.]

Both the Washington State Supreme Court and Division II of the Washington State Court of Appeals failed to find the necessary "indicia of reliability":

> It is difficult to conceive of a tip more "completely lacking in indicia of reliability" than one provided by a completely anonymous and unidentifiable informer, containing no more than a conclusionary assertion that a certain individual is engaged in criminal activity. While the police may have a duty to investigate tips which sound reasonable, absent circumstances suggesting the informant's reliability, or some corroborative observation which suggests either the presence of criminal activity or that the informer's information was obtained in a reliable fashion, a forcible stop based solely upon such information is not permissible. 84 Wash.2d at 944, 10 Wash. App. at 285.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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